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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JASON CARTAYA,

Plaintiff and Appellant,

v.

M&T BANK et al.,

Defendants and Respondents.

D075105

(Super. Ct. No. RIC1509824)

APPEAL from a judgment of the Superior Court of Riverside County, Angel M. Bermudez, Judge. Affirmed.

Stephen F. Lopez for Plaintiff and Appellant.

Reed Smith, Kasey J. Curtis and Benjamin R. Fliegel for Defendants and Respondents M&T Bank and Lakeview Loan Servicing, LLC.

Schwartz & Deutsch and Robert A. Schwartz for Defendant and Respondent Pacific Union Financial.

Defendants M&T Bank, Lakeview Loan Servicing, LLC (Lakeview), and Pacific Union Financial, LLC (Pacific Union) were lenders and/or mortgage servicers on Jason

Cartaya's residential mortgage loan, under which he defaulted. He claimed defendants wrongfully foreclosed on his property after agreeing to modify his loan obligations. The trial court granted summary judgment to defendants. On appeal, Cartaya argues that triable issues of material fact remain on each of his causes of action arising out of the loan modification. He also argues the court erred in awarding attorney fees to Pacific Union. We do not find merit in Cartaya's arguments and accordingly affirm the judgment.

### FACTUAL BACKGROUND

In November 2011, Cartaya entered into a residential mortgage loan transaction with Pacific Union. He executed a promissory note (note) in favor of Pacific Union in the amount of \$190,056, secured by a deed of trust on real property located in Temecula (the property). The note and deed of trust together constituted the "loan."

Cartaya was required to make monthly loan payments commencing on January 1, 2012; he acknowledged that a failure to do so would result in a sale of the property. Another loan requirement was for Cartaya to maintain homeowner's insurance. In addition, the note provides that payments to the lender "shall be made" at a specified location or "at such other place as Lender may designate in writing by notice to Borrower." The "Lender" was Pacific Union, its successors, and assigns; the "Borrower" was Cartaya, his successors, and assigns.

In May 2012, Cartaya became unemployed, and two months later, he submitted a loan modification application to Pacific Union; this first application was denied because

he did not submit certain supporting information, such as a tax return and bank statements. In August 2012, Cartaya defaulted on payments due under the loan.

In May 2013, the trustee under the deed of trust (Northwest) recorded a "notice of default and election to sell" the property. Cartaya was in arrears of about \$15,500 on his loan payments.

In June 2013, Cartaya submitted a second loan modification application, which was again denied due to incomplete supporting information. On August 1, 2013, Northwest recorded a notice of trustee's sale, setting a property sale date later the same month. Meanwhile, Cartaya submitted a third and complete loan modification application (third application), which was approved by Pacific Union on September 11, 2013.

In connection with Cartaya's third application, Pacific Union offered him a trial payment plan (TPP), under which he was required to make three timely, monthly payments on the first day of October, November, and December 2013; in exchange, defendants agreed to cease foreclosure proceedings. In addition, if Cartaya successfully complied with the terms of the TPP, he would be approved for a permanent loan modification. Cartaya accepted the terms of the TPP, which contained a "time is of the essence" clause pertaining to payments.

In late September 2013, Cartaya received notices on behalf of both Pacific Union and M&T Bank providing that, effective October 2, 2013, his loan had been assigned to and would be serviced by M&T Bank. The notices stated that any payments due on or after October 2, 2013, must be sent directly to M&T Bank. Cartaya did not comply with

these payment instructions. Instead, he sent his payments to Pacific Union, which had no obligation to forward payments to M&T Bank after a 60-day transitional period expired. Of relevance here, M&T Bank did not receive Cartaya's third payment until January 17, 2014, or 47 days after the December 1, 2013 deadline.

Furthermore, to secure a permanent loan modification, Cartaya was required to obtain his own homeowner's insurance policy—not lender-placed insurance.<sup>1</sup> Prior to October 2013, Cartaya allowed his original insurance policy to expire; from that point through 2014, despite repeated requests from M&T Bank, Cartaya failed to provide proof that he had procured his own insurance policy on the property. In a letter dated June 7, 2014, M&T Bank notified Cartaya that his request for workout assistance had "been removed" because he failed to provide proof of homeowner's insurance.

In August 2015, Northwest recorded a notice of trustee's sale of the property with a sale date of September 2, 2015.

## PROCEDURAL BACKGROUND

In August 2015, Cartaya filed a complaint against Pacific Union, M&T Bank,<sup>2</sup> and Northwest.<sup>3</sup> The complaint sets forth causes of actions against Pacific Union and

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<sup>1</sup> M&T Bank explained to Cartaya that lender-placed insurance yields higher monthly premiums, less coverage, and inflated monthly loan payments to the borrower, compared to when the borrower purchases his or her own insurance policy. Thus, to secure a loan modification, M&T Bank requires that homeowners purchase their own insurance policy.

<sup>2</sup> The complaint was subsequently amended to add Lakeview as a defendant, which is associated with M&T Bank. They are collectively referred to herein as M&T Bank.

M&T Bank for: (1) breach of contract; (2) wrongful foreclosure; (3) fraud/promise without intent to perform; (4) breach of the implied covenant of good faith and fair dealing; (5) promissory estoppel; (6) violations of the Homeowners' Bill of Rights (Civ. Code, § 2923.6; HBOR); (7) violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.); and (8) cancellation of instruments. Defendants filed answers in response. Cartaya sought and received a preliminary injunction, precluding a sale of the property during the pendency of litigation.

After completing discovery, defendants filed motions for summary judgment. Cartaya opposed the motions. Following full briefing and a hearing on the matter, the trial court granted defendants' motions for summary judgment. Pacific Union additionally filed a motion for attorney fees, which was briefed and heard by the court. The court granted Pacific Union's motion for attorney fees. The court entered judgment for defendants, and this appeal followed.

#### SUMMARY JUDGMENT LEGAL STANDARDS

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; accord, Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must make a prima facie showing either that the plaintiff cannot establish one or more elements of a cause of action or that there is a complete defense to the action. (*Aguilar*, at p. 850; Code Civ. Proc., § 437c, subds. (o), (p)(2).) A defendant moving for summary judgment may

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<sup>3</sup> Northwest is not a party to this appeal.

satisfy this initial burden of production by presenting evidence that conclusively negates an element of the plaintiff's cause of action or by relying on plaintiff's factually devoid discovery responses to show that plaintiff does not possess, and cannot reasonably obtain, evidence to establish an element. (*Aguilar*, at pp. 854–855.) If the defendant makes such a showing, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact. (*Id.*, at p. 850.)

On review of an order granting summary judgment, an appellate court "independently examine[s] the record in order to determine whether triable issues of fact exist to reinstate the action." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) We view the evidence in the light most favorable to the party opposing the motion. (*Ibid.*) "We will affirm an order granting summary judgment ... if it is correct on any ground that the parties had an adequate opportunity to address in the trial court, regardless of the trial court's stated reasons." (*Securitas Security Services USA, Inc. v. Superior Court* (2011) 197 Cal.App.4th 115, 120.)

## DISCUSSION

### I. *There Are No Triable Issues of Material Fact*

Cartaya's claims are based on his allegation that he successfully complied with the terms of the TPP, which should have resulted in a permanent loan modification and halted further foreclosure proceedings. At the summary judgment stage, defendants produced evidence that Cartaya did not comply with the TPP's terms. According to defendants, Cartaya's loan remained in default, and foreclosure proceedings could

properly resume. We agree with defendants and conclude the trial court correctly granted summary judgment.

A. *Pacific Union Demonstrated It Did Not Engage in Alleged Misconduct*

As a preliminary matter, we address the claimed liability of Pacific Union separately from M&T Bank. The complaint largely treats the two unrelated entities as one and does not distinguish each entity's respective conduct. In support of its motion for summary judgment, Pacific Union produced evidence to show that it was not liable to Cartaya because it had not engaged in any alleged injury-causing conduct, i.e., post-TPP foreclosure proceedings.

Specifically, Pacific Union produced employee and attorney declarations and contractual documents showing, inter alia, that Pacific Union had "sold, transferred and assigned all of its right, title and interest in [the loan], and the servicing rights to [the loan], to ... M&T Bank. The effective date of sale was July 1, 2013 and the effective date of transfer of servicing rights was October 2, 2013." Pacific Union's declarations also showed it "had no involvement in attempting to foreclose against the [property] at any time subsequent to October 1, 2013." The servicing rights purchase and sale agreement as well as the assignment agreement, which transferred Pacific Union's servicing rights and title in Cartaya's loan to M&T Bank, were attached to Pacific Union's motion for summary judgment.<sup>4</sup>

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<sup>4</sup> Based on our review of the record, Pacific Union met its burden of proof based on admissible evidence.

Cartaya purported to dispute these material facts with three pieces of evidence: (1) the deposition transcript of Eric Haines, Pacific Union's vice president of mortgage servicing and corporate representative designated to testify on various deposition topics; (2) the 2011 note; and (3) a letter dated September 11, 2013, from Pacific Union to Cartaya, notifying him that his "request for Loss Mitigation" had been approved.

None of the three pieces of evidence proffered by Cartaya effectively refuted that, *after October 1, 2013*, Pacific Union was not involved in a foreclosure on the property. Haines's deposition testimony confirms, rather than refutes, Pacific Union's sale of the loan. In addition, the 2011 note says nothing about the holder/servicer of the note *as of October 2, 2013*. Similarly, the letter dated September 11, 2013, does not refute Pacific Union's transfer of servicing rights to M&T Bank *effective October 2, 2013*.<sup>5</sup> Although the burden had shifted to him, Cartaya failed to show there was any triable issue of material fact.

In his reply brief, Cartaya makes the unsupported suggestion that M&T Bank was an agent of Pacific Union, but he submitted no evidence of an agency relationship. Cartaya also argues that Pacific Union recorded an assignment of the deed of trust to Lakeview in 2015, which he asserts is inconsistent with its sale of the loan in 2013. The 2015 assignment is not inconsistent with the loan sale. Pacific Union's deputy general counsel declared under penalty of perjury that M&T Bank asked Pacific Union to execute the assignment in 2015 because the task had inadvertently not been done earlier in

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<sup>5</sup> The transfer of servicing rights was also supported by the uncontroverted notices to Cartaya informing him of the transfer.

connection with the 2013 sale. Because Pacific Union demonstrated it was not the cause of any harm to Cartaya, summary judgment was appropriate.

B. *Breach of Contract*

The factual predicate for all Cartaya's causes of action is the same: he claims he complied with the TPP and defendants breached the TPP by failing to permanently modify his loan and continuing to foreclose on the property. Defendants contend they showed on summary judgment that Cartaya did *not* comply with the TPP, and thus resuming foreclosure proceedings was appropriate.

Where, as here, the parties agreed that a permanent loan modification is contingent on certain acts or events, the acts or events are conditions precedent. (*Barroso v. Ocwen Loan Servicing, LLC* (2012) 208 Cal.App.4th 1001, 1009; see *Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 927–928.) The relevant act or event must be performed or must happen before the lender's contractual duty to permanently modify the loan arises. (*Bushell*, at p. 924 [permanent loan modification conditioned on borrower's compliance with "all terms of the TPP—including making all required trial payments and providing all required documentation"].)

Cartaya's breach of contract claim turns on whether he performed the conditions precedent to obtaining a permanent loan modification, that is, whether he made three timely loan payments under the TPP. Cartaya sent payments to Pacific Union's address noted on the TPP, ignoring multiple notices that his loan had been service-transferred to M&T Bank and directing him to send his payments to M&T Bank's address. The result

was that his last payment to M&T Bank was late. The TPP itself does not provide for what must happen if the lender or servicer changes the payment address.

To resolve this issue, we must determine the parties' mutual intent. " ' "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. [Citation.] Such intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.] The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' [citation], controls judicial interpretation." ' ' " (*E.M.M.I. Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 470.) "Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822.)

We are guided by other well-established contract principles. "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." (Civ. Code, § 1642;<sup>6</sup> *Kerivan v. Title Ins. & Trust Co.* (1983) 147 Cal.App.3d 225, 230 [note and deed of trust must be read and construed together].) A modification or alteration of a contract, unlike a novation, does not terminate the preexisting contract. (*Davies Machinery Co. v. Pine Mountain Club, Inc.* (1974) 39 Cal.App.3d 18, 25.) "[T]he effect is to alter only those portions of the

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<sup>6</sup> Further unspecified statutory references are to the Civil Code.

written contract directly affected by the [modification] agreement leaving the remaining portions intact." (*Ibid.*; see § 1698.)

In addition, a " 'contract may validly include the provisions of a document not physically a part of the basic contract. ... "For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties." ' " (*Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 54.) "The contract need not recite that it 'incorporates' another document, so long as it 'guide[s] the reader to the incorporated document.' " (*Ibid.* [patent agreement incorporated university's patent policy by directing plaintiff to the policy].)

Applying the above principles, we conclude Cartaya failed to perform the conditions precedent to obtaining a permanent loan modification. We construe the TPP in relevant context: Throughout their dealings, the parties maintained a lender-borrower relationship with respect to Cartaya's residential loan. He defaulted on his mortgage loan payments, failed to make any payments for over a year, and was in significant arrears. He twice failed to complete loan modification applications. On his third application, Pacific Union offered him the TPP. Contrary to Cartaya's position on appeal, the TPP cannot be construed in isolation without reference to the loan contracts (the note and deed of trust), which are repeatedly referenced on the face of the TPP.

For example, the TPP contains the following factual recitals, the truth of which is undisputed (bold emphasis omitted):

"1. Lender has made a loan to Mortgagor(s) that became delinquent on AUGUST 1st 2012.

"2. The loan is evidenced by a Promissory Note and is secured by a Mortgage dated on or about NOVEMBER 22nd 2011 for a Note in the amount of \$190,056.00.

"3. The current Unpaid Principal Balance is \$188,185.31, with a current due date of AUGUST 1st 2012.

"4. Mortgagor(s) failed to make the monthly payment due AUGUST 1st 2012 and all subsequent amounts due thereafter.

"5. The parties hereto desire to enter into an agreement, which, after the plan expires, the Mortgagor(s) are approved for a Loan Modification or Partial Claim, upon No Default of the Forbearance 'Agreement.' Default is defined as follows:

"a.) Borrower abandons the property.

"b.) Borrower does not make the scheduled Trial Plan Payment within 15 days of the Trial Plan Payment due date.

"6. If the Trial Payment Plan is followed by an FHA Modification, terms will be set at an Interest Rate no greater than 4.75%. Principal, Interest, Taxes and Insurance, will be communicated at the start of the modification, with a term no greater than 360 months.

"7. In consideration of the conditions set forth below, Lender shall grant Mortgagor(s) forbearance from any foreclosure action for the delinquent mortgage payments beginning with the AUGUST 1st 2012 payment and monthly thereafter."<sup>7</sup>

Furthermore, the consequence of Cartaya's failure to comply with the TPP refers to provisions in the note: "In the event [Cartaya] fails to tender agreed upon amounts and/or execution of foresaid Note and Mortgage, by each specified date, **WHEREIN**

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<sup>7</sup> Cartaya is the referenced "Mortgagor" and "Borrower."

**TIME IS OF THE ESSENCE**, to the Lender, such an act shall be an automatic breach of this 'Agreement' and Lender shall thereafter have the right to proceed with appropriate action *as described in the mortgage and note.*" (Italics added.)

Our review of the relevant documents convinces us that the parties had the following mutual intention: (1) the TPP must be construed with the loan because the TPP has no legal effect standing alone; (2) the loan remained in force and effect *except* as modified by the TPP; (3) the TPP incorporated the loan terms except as modified; (4) "payments" under the TPP were loan payments, that is, they were being made to satisfy Cartaya's debt evidenced by the note;<sup>8</sup> and (5) the lender (as defined in the note) retained the right to (a) sell and/or assign the loan, and (b) designate a new location where loan payments must be made, with written notice to the borrower.

Cartaya simplistically asserts he was entitled to a permanent loan modification by sending three payments to the address noted on the TPP, even if that resulted in a late payment. This assertion entirely ignores the loan contract, under which Pacific Union (and its successors) could assign the loan and designate a different payment location. It is undisputed Cartaya was properly notified that Pacific Union would "stop accepting payments ... October 1, 2013" and that he must "[s]end all payments due on or after [October 2, 2013] to [M&T Bank]." The notices contained the new payment address and

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<sup>8</sup> The verified complaint alleges that, "[p]ursuant to the [TPP, Cartaya] agreed to make payments on the Subject Note in the sum of \$1,247.34 beginning on October 1, 2013 through December 1, 2013 ...." This constitutes a judicial admission that payments made under the TPP constituted payments on the note. (See *Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1324 [allegation of fact in a complaint is a conclusive concession of truth of the fact].)

servicer's contact information if Cartaya had any questions. He failed to follow the payment directives, resulting in an untimely loan payment under the TPP. Cartaya admitted that, even after he was notified his last payment had not reached M&T Bank, he waited over two weeks before sending in a new payment. Because Cartaya did not make all three timely loan payments under the TPP, M&T Bank could proceed with a foreclosure. The trial court properly granted summary judgment to defendants on Cartaya's breach of contract cause of action.<sup>9</sup>

C. *Breach of Implied Covenant of Good Faith and Fair Dealing*

Cartaya's claim for breach of the implied covenant of good faith and fair dealing relied on the same analysis underlying his breach of contract claim. As we have discussed, he did not establish defendants' breach of any contractual obligations. Moreover, "implied terms should never be read to vary express terms ... 'if defendants were given the right to do what they did by the express provisions of the contract there can be no breach [of the implied covenant].'" (*Carma Developers (California), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374.) Here, Cartaya's failure to make three timely loan payments under the TPP expressly allowed M&T Bank to proceed with foreclosure. Thus, defendants were properly granted summary judgment on the breach of implied covenant cause of action.

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<sup>9</sup> Defendants also asserted they could lawfully proceed with a foreclosure because Cartaya failed to provide required documentation of homeowner's insurance. Based on our resolution of the case, we need not discuss the homeowner's insurance issue.

D. *Promissory Estoppel*

Regarding Cartaya's promissory estoppel claim, the complaint alleges defendants induced him to enter in the TPP and promised him a permanent loan modification "if he complied with the [TPP.]" Cartaya allegedly relied to his detriment on defendants' promises.

The elements of promissory estoppel are: (1) a promise, (2) the promisor should reasonably expect the promise to induce action or forbearance on the part of the promisee or a third person, (3) the promise induces action or forbearance by the promisee or a third person (i.e., detrimental reliance), and (4) injustice can be avoided only by enforcement of the promise. (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 803.)

For reasons we have discussed, Cartaya's claim for promissory estoppel fails because defendants established on summary judgment that he did not comply with the TPP; the "promise" not to foreclose on his property was expressly conditioned on his compliance.<sup>10</sup> A case repeatedly cited by Cartaya on appeal, *Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1063 (*Chavez*), is inapposite and readily distinguishable. *Chavez* was decided on demurrer, and the court of appeal concluded, by liberally construing the complaint, the plaintiff sufficiently alleged that "all preconditions to modifications had been satisfied, [and] Chavez's original loan documents would automatically be modified on the date stated in the Modification Agreement." (*Id.*

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<sup>10</sup> We assume for purposes of analysis that promissory estoppel is a viable theory of liability even though, as defendants point out, the alleged promise was part of a written contract and the doctrine of promissory estoppel only applies when there is no contract. (*Money Store Investment Corp. v. So. Cal. Bank* (2002) 98 Cal.App.4th 722, 732.)

at p. 1060.) In contrast, this case was decided on summary judgment, and the undisputed evidence showed that Cartaya did not comply with all "preconditions" to obtaining a permanent loan modification. Accordingly, the trial court correctly granted summary judgment to defendants on the promissory estoppel cause of action.

E. *Fraud / Promissory Fraud*

Cartaya's claim for promissory fraud was asserted against Pacific Union only and was based on its alleged promise to permanently modify his loan if he complied with the TPP. According to Cartaya, Pacific Union had no intention to modify his loan and instead fully intended to foreclose on the property from the outset.

As discussed in sections I.A. and I.B., *infra*, Pacific Union demonstrated on summary judgment that, after October 1, 2013, it had no interest in the loan and was not involved in any foreclosure on the property. In addition, Pacific Union's promise to permanently modify Cartaya's loan was contingent on his compliance with the TPP, which he did not do. The trial court properly granted summary judgment to Pacific Union on the fraud cause of action.

F. *HBOR Violation*

The complaint alleges that defendants violated HBOR by proceeding to foreclose on his property even though Cartaya had submitted a complete application for a loan modification. Cartaya claims that defendants engaged in "dual tracking."

Section 2923.6<sup>11</sup> "prohibited the recording of a notice of default or notice of sale (or the conducting of a trustee's sale) during the pendency of a first lien loan modification application, and set forth a number of requirements that had to be met before a notice of default or notice of sale could be recorded." (*Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1124, citing § 2923.6, subds. (c)–(f).) The statute prohibits "dual tracking," or the practice of recording foreclosure-related notices while a completed loan modification application is still pending. (*Gillies v. JPMorgan Chase Bank, N.A.* (2017) 7 Cal.App.5th 907, 912.)

Section 2923.6, subdivision (c), states:

"(c) If a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower's mortgage servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending. A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale or conduct a trustee's sale until any of the following occurs:

"(1) The mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period pursuant to subdivision (d) has expired.

"(2) The borrower does not accept an offered first lien loan modification within 14 days of the offer.

"(3) The borrower accepts a written first lien loan modification, but defaults on, or *otherwise breaches the borrower's obligations under, the first lien loan modification.*" (Italics added.)<sup>12</sup>

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<sup>11</sup> All references to section 2923.6 are to the version that was effective between January 1, 2013 and December 31, 2017. (Stats. 2012, ch. 87, § 7.)

<sup>12</sup> See also section 2924.18, which contains similar requirements as section 2923.6.

Section 2923.6, subdivision (d), provides, "[i]f the borrower's application for a first lien loan modification is *denied*, the borrower shall have at least 30 days from the date of the written denial to appeal the denial and to provide evidence that the mortgage servicer's determination was in error." (Italics added.)

Cartaya contends he had a pending loan modification application at the time Northwest recorded a notice of trustee's sale in August 2015. Defendants argue in response that he did not have a pending loan modification application at the time the notice was recorded because Cartaya's third application was *approved*, as evidenced by the TPP agreement he accepted. Moreover, he breached his obligations under the TPP, allowing the notice of trustee's sale to be recorded. We agree with defendants' analysis.

The allegations of Cartaya's verified complaint belie his contention that defendants engaged in dual tracking. The complaint alleges that his third application for a loan modification (i.e., his "request for Loss Mitigation") was approved, Pacific Union offered him the TPP, Cartaya accepted the terms, and the TPP modified the loan.

It was only *after* Cartaya defaulted on or breached the terms of the TPP that a notice of trustee's sale was recorded. Under section 2923.6, subdivision (c)(3), a mortgage servicer may resume its recording of foreclosure-related notices if a borrower breaches his obligations under the modified loan. Accordingly, defendants established they did not violate HBOR or engage in dual tracking.

On appeal, Cartaya argues that a 2014 letter from M&T Bank, which stated his "request for workout assistance [had] been removed," was an improper denial of a

pending loan modification application because it did not contain certain information, such as his appeal rights. (See § 2923.6, subd. (f) [written notice requirements for denials of loan modification applications].) Whatever might be said of the letter, it was not a "denial" of his third application since, as we have discussed, Pacific Union approved his third application and undisputedly offered him the TPP. Because no completed loan application was pending at the time the notice of trustee's sale was recorded, there was no violation of HBOR.

#### G. *Wrongful Foreclosure*

To maintain a wrongful foreclosure claim, a plaintiff must establish that "(1) the defendants caused an illegal, fraudulent, or willfully oppressive sale of the property pursuant to a power of sale in a mortgage or deed of trust; (2) the plaintiff suffered prejudice or harm; and (3) the plaintiff tendered the amount of the secured indebtedness or was excused from tendering." (*Chavez, supra*, 219 Cal.App.4th at p. 1062.)

Here, Cartaya's wrongful foreclosure claim shared the same factual predicate as his other claims, and defendants established their conduct was not "illegal, fraudulent, or willfully oppressive." We need not address the issue of whether Cartaya suffered prejudice or was excused from tendering his amount of indebtedness. Defendants were properly granted summary judgment on the wrongful foreclosure cause of action.

#### H. *UCL Violation*

Cartaya's claim for a violation of the Unfair Competition Law (UCL) was premised on his claims that defendants violated HBOR and wrongfully foreclosed on his property. (See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*

(1999) 20 Cal.4th 163, 180 [" '[S]ection 17200 "borrows" violations of other laws and treats them as unlawful practices' " that are independently actionable]; Bus. & Prof. Code, § 17200 [prohibiting unlawful, unfair or fraudulent practices].) However, as we have discussed in sections 1.F. and 1.G., defendants established they did not violate HBOR or conduct a wrongful foreclosure. As a result, Cartaya's claim under the UCL fails.<sup>13</sup> (*Krantz v. BT Visual Images, LLC* (2001) 89 Cal.App.4th 164, 178 [UCL claim stands or falls depending on antecedent substantive causes of action].)

#### I. *Cancellation of Instruments*

"Under Civil Code section 3412, '[a] written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled.' To prevail on a claim to cancel an instrument, a plaintiff must prove (1) the instrument is void or voidable due to, for example, fraud, and (2) there is a reasonable apprehension of serious injury including pecuniary loss or the prejudicial alteration of one's position." (*U.S. Bank National Assn. v. Naifeh* (2016) 1 Cal.App.5th 767, 778.)

For all the reasons we have discussed, defendants showed the 2015 recorded notice of trustee's sale was not fraudulent; rather, it was authorized by the parties' agreements. Cartaya was not entitled to have the document voided or cancelled.

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<sup>13</sup> Based on our conclusion, we have no need to address whether Cartaya had standing to maintain a UCL claim.

In conclusion, the trial court properly granted summary judgment to defendants on all causes of action.

II. *The Trial Court Properly Awarded Attorney Fees to Pacific Union*

The note contains the following attorney fees clause: "**(C) Payment of Costs and Expenses** [¶] If Lender has required immediate payment in full [due to Borrower's default], ... Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note to the extent not prohibited by applicable law. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note."

Based on the note's attorney fees clause, Pacific Union contended in its motion for attorney fees that it was a prevailing party in an action "on a contract." (§ 1717.) At the time of its motion, Pacific Union had incurred approximately \$123,582 in fees.

Cartaya opposed the motion, arguing his claims were not based on the note, but rather on the TPP or "modification agreement," which did not contain a provision for attorney fees. He further argued that the note's attorney fees provision did not fit the facts of this case and Pacific Union could not recover fees for defending against his wrongful foreclosure tort claim. Finally, Cartaya argued that allowing Pacific Union to recover attorney fees in the case would violate the one-form-of-action rule under Code of Civil Procedure section 726.

The trial court slightly reduced the amount of Pacific Union's requested fees but otherwise granted the motion. On appeal, Cartaya raises the same arguments he made in proceedings below.

A. *Legal Principles*

We review a determination of the legal basis for an award of attorney fees de novo as a question of law. (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 237 (*Barnhart*).)

"California follows the 'American rule,' under which each party to a lawsuit must pay its own attorney fees unless a contract or statute or other law authorizes a fee award." (*Barnhart, supra*, 211 Cal.App.4th at p. 237.)

"Section 1717 governs attorney fees awards authorized by contract and incurred in litigating claims sounding in contract. [Citations.] Under that statute, when a contract provides for an award of fees 'incurred to enforce that contract,' 'the party prevailing on the contract ... shall be entitled to reasonable attorney's fees' regardless of whether he or she is the party specified in the contract or not. (*Barnhart, supra*, 211 Cal.App.4th at p. 237; § 1717, subd. (a).)

"In determining whether an action is 'on the contract' under section 1717, the proper focus is not on the nature of the remedy, but on the basis of the cause of action." (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 347 (*Kachlon*) [claims were based on the note and deed of trust even if remedy sought was equitable in nature].) "Whether a particular action is 'on a contract' turns on the allegations contained in the plaintiff's pleadings." (*Walsh v. New West Federal Savings & Loan Assn.* (1991) 234 Cal.App.3d 1539, 1547.)

Generally, an "action (or cause of action) is 'on a contract' for purposes of section 1717 if (1) the action (or cause of action) 'involves' an agreement, in the sense that the

action (or cause of action) arises out of, is based upon, or relates to an agreement by seeking to define or interpret its terms or to determine or enforce a party's rights or duties under the agreement, and (2) the agreement contains an attorney fees clause." (*Barnhart, supra*, 211 Cal.App.4th at p. 242.)

B. *Analysis*

Applying the foregoing principles, we conclude Cartaya's causes of action were "on a contract" for purposes of section 1717. It is undisputed that the note contains an attorney fees clause. Moreover, the factual predicate for all Cartaya's claims "involved" the note in the sense that a resolution of each claim could not be reached without defining, interpreting, or otherwise determining each party's rights and duties under the note. The complaint alleged, as to each cause of action, that the TPP *modified the note*. As we have discussed, the TPP had no standalone legal effect. Both in prosecuting and defending the case, the parties relied on their respective rights and obligations under the note.

Further, the note's attorney fees clause applied to the facts of this case, and Pacific Union could recover its fees in defending against the wrongful foreclosure claim. The note's attorney fees clause allowed recovery of fees incurred "for enforcing [the] Note." In defending itself against *all* Cartaya's claims, Pacific Union was enforcing the validity of the note and the lender's rights and remedies thereunder, including the right of assignment. Under the circumstances, Pacific Union could recover its attorney fees. (See, e.g., *Kachlon, supra*, 168 Cal.App.4th at p. 348 [actions to enjoin nonjudicial foreclosure and quiet title were "on a contract" for purposes of attorney fees].)

Even assuming certain of Cartaya's claims were not contractual per se, the record supports that the attorney fees incurred by Pacific Union in defending against those claims could not be practicably apportioned. (See *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129–130 ["Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed."].) When claims for relief are "inextricably intertwined" and rest on identical facts, the trial court may reasonably conclude that it is impracticable to separate out attorney fees into compensable and noncompensable units. (*Calvo Fisher & Jacob LLP v. Lujan* (2015) 234 Cal.App.4th 608, 626.) That is the case here. Cartaya has failed to establish trial court error.

He further argues the award of fees to Pacific Union violated Code of Civil Procedure section 726.<sup>14</sup> Under that section, "there is but one form of action for the recovery of a debt secured by a trust deed, which is one to foreclose the trust deed." (*Stark v. Coker* (1942) 20 Cal.2d 839, 845.) "The purpose of the [one-form-of-action] rule is to limit a secured creditor to a single suit to enforce its security interest and collect its debt and to compel the exhaustion of all security before a monetary deficiency

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<sup>14</sup> Code of Civil Procedure section 726 provides: "There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property or an estate for years therein, which action shall be in accordance with the provisions of this chapter. In the action the court may, by its judgment, direct the sale of the encumbered real property or estate for years therein (or so much of the real property or estate for years as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, the expenses of levy and sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney's fees, the sum for attorney's fees as the court shall find reasonable, not exceeding the amount named in the mortgage." (Code Civ. Proc., § 726, subd. (a).)

judgment may be obtained against the debtor." (*Nat. Enters. v. Woods* (2001) 94 Cal.App.4th 1217, 1221.) The rule prevents a multiplicity of lawsuits against the debtor. (*Bank of America, N.A. v. Roberts* (2013) 217 Cal.App.4th 1386, 1397.) Considering the language and purpose of the statute, at least one court of appeal has held the one-form-of-action rule does not apply when an action to enjoin a nonjudicial property sale was initiated by the debtor. (E.g., *Passanisi v. Merit-Mcbride Realtors, Inc.* (1987) 190 Cal.App.3d 1496, 1506.)

We are persuaded the one-form-of-action rule does not bar Pacific Union from recovering its attorney fees in this case. Like in *Passanisi*, Pacific Union did not initiate an action against Cartaya. After 2013, Pacific Union had no security interest in the property and no option of foreclosing on it. Applying the one-form-of-action rule here would not serve the statute's purpose or have prevented any lawsuits against the debtor.

In his reply brief, Cartaya cites a case that was decided after his opening brief was filed, *Chacker v. JPMorgan Chase Bank, N.A.* (2018) 27 Cal.App.5th 351 (*Chacker*), to support his argument that any award of attorney fees could only be added to the principal of the loan and recovered, if at all, through foreclosure. (See *id.* at pp. 356–357.) *Chacker* is distinguishable. There, the applicable attorney fees provision was contained in the *deed of trust* and provided as follows: " 'Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including ... paying reasonable attorneys' fees to protect its interest in the Property and/or rights under the Security Instrument ....' Section 9 [of the deed of trust] further specifies ... that any amounts disbursed by Lender for this purpose 'shall

*become additional debt of Borrower secured by this Security Instrument'* and that the 'amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.' " (*Id.* at pp. 356–357, italics added.)

The language of the attorney fees provision in *Chacker*—" 'shall become additional debt of Borrower secured by this Security Instrument' "—combined with the specified way amounts were to be paid by the borrower, led the court to conclude attorney fees could only be added to the loan amount. (*Chacker, supra*, 27 Cal.App.5th at p. 357.) Additionally, no other clause in the deed of trust provided for a separate award of attorney fees. (*Ibid.*)

In contrast, the attorney fees provision here is contained in the *note*; noticeably absent from the note is any language to the effect that incurred attorney fees "shall" or must become debt secured by the deed of trust.<sup>15</sup> Indeed, the clause does not reference any security interest at all. It states: "Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note to the extent not prohibited by applicable law. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note." Although the provision states that fees "shall bear interest" using the Note's interest rate, it does not specify or limit the manner of payment.

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<sup>15</sup> Pacific Union's motion for attorney fees was based solely on the note's attorney fees provision. Cartaya has consistently posited that the deed of trust provides no basis for Pacific Union to recover attorney fees.

As in *Chacker*, we adhere to the legal principle that "entitlement to attorney fees derives from the contractual terms chosen" and that parties "may limit or expand the circumstances under which attorney fees are awardable" and how they "may be obtained." (*Chacker, supra*, 27 Cal.App.5th at p. 357.) In this case, the attorney fees provision does not support a conclusion that fees incurred to enforce the note must be added to Cartaya's secured debt and recovered only through foreclosure.

In sum, the trial court did not err in awarding attorney fees to Pacific Union as a prevailing party under section 1717.

#### DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendants.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

IRION, J.